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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-

WILLIAM ROSS ADEY, *Petitioner*

v.

UNITED ACTION FOR ANIMALS, INC.; ELEANOR SEILING and MACDONALD WHITE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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William Ross Adey petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The judgment order of the court of appeals (App. A, *infra*, p. 1a) is reported at 493 F.2d 1397. The opinion and order of the district court (App. B, *infra*, pp. 2a-17a) is reported at 361 F. Supp. 457.

JURISDICTION

The judgment of the court of appeals was entered on April 1, 1974.[1] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the constitutional standards of *New York Times Co.* v. *Sullivan*, 376 U.S. 254, applicable to suits for libel by public officials and public figures, or the state law standards of *Gertz* v. *Robert Welch, Inc.* (No. 72-617), applicable to suits by private individuals involved in matters of public interest, govern a libel suit by a private scientist who is temporarily involved in a project funded by the federal government.

2. Whether the *New York Times Co.* constitutional standards apply where the defamatory statements are distributed to a small group of subscribers of a private reporting service to which the plaintiff lacks access for purposes of rebuttal.

STATEMENT

Petitioner Adey is a medical doctor and internationally recognized research specialist in diseases of the brain who is employed by the University of California at Los Angeles as Professor of Anatomy and Physiology and as a staff member of the Brain Research Institute (Tr. 110, 144).[2] Dr. Adey has published over

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[1] The ninety-day period for filing the petition for a writ of certiorari (28 U.S.C. 2101(c)) expired on Sunday, June 30, 1974; accordingly, the petition was due and was filed on July 1, 1974. Supreme Court Rule 34(1).

[2] "Tr." references are to the transcript of the trial; "App." references are to the appendix in the court of appeals.

three hundred scientific papers and books in his field of interest, and serves as a consultant to the National Academy of Sciences, National Institute of Health, NASA, the Atomic Energy Commission, and the President's Science Advisory Committee (Tr. 147-148). He is not and has not been an official of any of these government agencies.

Petitioner's principal interests in research at U.C.L.A. have involved the development of techniques of surgical research on animals which can be applied to human patients suffering from epilepsy, Parkinson's disease, and various forms of mental retardation (Tr. 162, 170; App. 124). However, in 1964 petitioner submitted a protocol to NASA involving "a monkey experiment to investigate the long term effects of weightlessness on the central nervous system" (Tr. 193). The experiment was approved and funded by NASA (App. 201).

Petitioner's protocol was supplemented by experiments conducted by scientists at several other universities (Tr. 193-195; Tr. 141). As a culmination of this research, NASA launched a primate into orbit on June 28, 1969, and petitioner coordinated the evaluation of the medical results (App. 142, 170-171). The monkey died shortly after returning to Earth although the scientists involved in the experiment reported that "excellent data" was obtained from sensors in his body (App. 9).

Shortly after the experiment ended, respondent United Action for Animals, Inc. (UAA) distributed a "special report" to its paid membership of approximately 2500 and to affiliated humane societies (App. 27-28). No distribution of this material was made to

the press or to the members of Congress, and no public press release was ever made (App. 79; Tr. 74). While the report criticized the recent experiment, much of it viciously attacked [3] petitioner's work at U.C.L.A. and Oxford University; two representative statements are the following:

> Dr. W. Ross Adey is with the Brain Research Institute of the University of California at Los Angeles (UCLA). He has a long history of abuse of animals * * * .
>
> * * * *
>
> Adey has performed a wide variety of exceedingly cruel animal experiments, including the vibration of live animals with electrodes in their brains in the name of "brain research."

(App. 9, 18).

Following distribution of the report to UAA members, petitioner brought this suit for libel against UAA and two of its officers who prepared the report, respondents Seiling and White.[4] Respondents conceded

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[3] One medical expert at U.C.L.A. described the report in the following terms: "I have seen many articles criticizing science activities or—regarding the use of animals. But never did I see anything so vicious, so malicious as this particular article" (App. 314). As noted below, respondents agreed that numerous statements in the report were defamatory *per se* (App. 26, 340).

[4] Miss Seiling, who wrote the report, testified that she had not completed high school but read many scientific articles, at least "the ones I can understand" (Tr. 50). She admitted she consulted no medical or scientific experts in writing the report, and (1) knew nothing of Dr. Adey's training or specialties except "I knew he used animals in research" (App. 83), (2) knew nothing about Dr. Adey's care of the animals (App. 47; Tr. 15), and

at trial that the statements set forth above among others were defamatory, but contended that they were either true or protected by the doctrine of fair comment under New York law (Pet. App. B, *infra*, p. 5a). Respondents also argued that Dr. Adey could not recover unless he could show the statements were made with knowledge of their falsity or with reckless disregard for the truth, because Dr. Adey

> was acting in a public capacity in that he was supervising an experiment supported by expenditures of public funds appropriated by the Congress and allocated by the National Aeronautics and Space Administration. The matter was likewise one of public interest in view of the involvement of public funds, the widespread public debate and the extensive press coverage. *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29 (1971); *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964).

Defendant's Requested Conclusion of Law 4.

Petitioner, while arguing that "a different standard of proof" *should be* applied to a person in his position (Plaintiff's Post Trial Brief at 21-22), acknowledged that he could "be deemed a 'public figure' or at least a person involved in an event of public interest under the doctrine" of *Rosenbloom* v. *Metromedia, Inc.*, 403

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(3) knew there "is no proof in existence that an animal suffers" in general or specifically in Dr. Adey's experiments (App. 32, 33). Miss Seiling stated that her position was that any experiment is savage and cruel if it doesn't have to be done (App. 63), and suggested that all experiments be done using computers (App. 40), but conceded that her only knowledge of computers was that "I saw one once" (App. 45) and that she knew there was no mathematical model in existence to duplicate Dr. Adey's protocol (App. 46).

U.S. 29.[5] The district court construed this as an "acknowledgment that plaintiff was a public figure and that the flight was a matter of public interest" (Pet. App. B, *infra*, p. 6a), and since the law as it then stood under *Rosenbloom* applied the same Constitutional standard to a public figure and a citizen involved in a matter of public interest, the district court ruled that the actual malice standard of *New York Times Co.* v. *Sullivan* applied (Pet. App. B, *infra*, p. 6a).

Under that standard, the court found that respondents had a "sincere and genuinely held belief" in the truth of their statements, which belief was not "drawn out of thin air or a product of their imaginations" (Pet. App. B, *infra*, p. 13a). The court therefore concluded that petitioner had not met his burden of proving actual malice in the Constitutional sense (Pet. App. B, *infra*, p. 16a). The court also rejected petitioner's contention that the publication of defamatory statements in a private publication distributed to a limited number of subscribers rendered the Constitutional privilege inapplicable, indicating that Dr. Adey could have responded to these statements in the media and by contacting "his professional colleagues and the university community" (Pet. App. B, *infra*, p. 9a).

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[5] Plaintiff's Requested Conclusions of Law 5. As the law stood at the time under *Rosenbloom*, of course, it was legally immaterial whether petitioner was a public figure or a private individual involved in matters of public interest, for in either event the "actual malice" standard of *New York Times Co.* v. *Sullivan*, 376 U.S. 254 was applicable. Accordingly, and in light of the fact that petitioner conceded no more than that he was *either* a public figure or involved in a matter of public interest, the district court's statement that Dr. Adey acknowledged he was one or the other cannot fairly be construed as a factual finding that Dr. Adey was a public figure.

Petitioner appealed, contending principally that he had satisfied the "actual malice" standard, but also preserving the issue that "a lesser standard of constitutional proof should be applicable where the plaintiff is not a public figure" (Appellant's Brief at 26).[6] The court of appeals affirmed the decision without opinion (Pet. App. A, *infra*, p. 1a).[7]

REASONS FOR GRANTING THE WRIT

This case raises important questions concerning the accorded privately-employed scientists whose research efforts are funded or supported by government agencies, when those efforts become the subject of libelous comment in privately circulated publications. The lower courts concluded that petitioner, whose research into the effect of weightlessness upon the brain and central nervous system was funded in part by NASA, thereby became either a public figure or a private citizen involved in matters of public interest, so that

[6] The brief on appeal stated:

> First, for the reasons set forth in the opinion by Justice Harlan, for himself and three other members of the Supreme Court, in *Curtis Publishing Co.* v. *Butts*, *supra*, 388 U.S. at 133ff, we believe that a lesser standard of constitutional proof should be applicable where the plaintiff is not a public figure. We recognize that the majority of the Supreme Court has, by narrow margins, rejected that position, and therefore we wish merely to preserve the point should either party seek further review of this case.

(Appellant's Brief at 26).

[7] At oral argument, petitioner's counsel specifically asked the court of appeals to defer its decision pending the outcome of *Gertz* v. *Robert Welch, Inc.*, 471 F. 2d 801, certiorari granted, 410 U.S. 925, reversed, No. 72-617, June 25, 1974, then argued and under submission in this Court. However, the court of appeals summarily affirmed without awaiting the decision in *Gertz*.

the actual malice standards of *New York Times Co.* v. *Sullivan,* 376 U.S. 254, as expanded by *Rosenbloom* v. *Metromedia, Inc.,* 403 U.S. 29, governed his suit for libel against the respondent corporation.

However, this Court's recent decision in *Gertz* v. *Robert Welch, Inc.,* No. 72-617, decided June 25, 1974, established that "the level of constitutional privilege for defamatory falsehood [varies] with the status of the person defamed" (Slip op. at 9), so there is now a significant difference between the constitutional standards to be met by public officials and public figures on the one hand[8], and private individuals involved in matters of public interest on the other. The district court's statement that petitioner had acknowledged he was a public figure and his project a matter of public interest—based as it was upon petitioner's concession that he was one or the other (see fn. 5, *supra*)—cannot fairly be read as resolving this now-crucial issue. Therefore, the proper course is for this Court to follow "[o]ur well established practice of a remand for reconsideration in the light of a subsequent decision * * * ", *W.M.C.A., Inc.* v. *Simon,* 370 U.S. 190, 191; see Stern and Gressman, *Supreme Court Practice,* § 5.12, p. 221, particularly since petitioner, anticipating *Gertz,* preserved in the court of appeals the point that "a lesser standard of constitutional proof should be applicable where the plaintiff is not a public figure" (Appellate Brief at 26).[9]

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[8] Such individuals were collectively described by Chief Justice Warren in *Curtis Publishing Co.* v. *Butts,* 388 U.S. 130, 165 as "public men."

[9] Even had the issue not been explicitly raised and thus preserved, this Court has made it clear that there can be no waiver of a right which is judicially created after the alleged waiver. *Curtis Publishing Co.* v. *Butts, supra,* 388 U.S. at 143 (Harlan, J.).

In addition, because there is lacking here the public distribution of libelous comments which has characterized every such decision to reach this Court since *New York Times Co.* v. *Sullivan, supra,* this case presents the opportunity to decide whether privately distributed libels are protected by the same actual malice standard governing public libels. The Court has often supported application of this standard because the plaintiff "had sufficient access to the means of counterargument" to rebut the libel, *Curtis Publishing Co.* v. *Butts, supra,* 388 U.S. at 155 (Harlan, J.), and has recognized that "the relative opportunities * * * to rebut defamatory charges might be germaine" to determining the standard, *Time, Inc.* v. *Hill,* 385 U.S. 374, 391, but has never passed upon the question presented here. The lower federal courts, however, have concluded that in certain circumstances libels in privately distributed publications are not entitled to constitutional protection because the plaintiff "lacks the very access to the medium which *Times* and its progeny assumed." *Grove* v. *Dun & Bradstreet, Inc.,* 438 F. 2d 433, 437, certiorari denied, 404 U.S. 898.

1. Without any question the federal government constitutes the largest financial supporter of basic and applied scientific research in private colleges and universities in this country. Public funding of a "sustained, broad-based national effort in science and technology" has substantially increased in recent years,[10]

[10] Message of the President transmitting Reorganization Plan No. 1 of 1973, 38 F.R. 9579, at 5 U.S.C. (Supp. III, 1973) App. II. For example, the appropriations for the National Science Foundation increased from $40,000,000 in 1958 to $495,000,000 in 1968. S. Rep. 1137, 90th Cong., 2d Sess., at 1972 U.S.C.C.A.N. 2644, 2651.

both through research grants from individual agencies such as the Departments of Agriculture, H.E.W., Defense, the Food and Drug Administration and others, and through the activities of the National Science Foundation. The Foundation, for example, is directed

> to initiate and support basic scientific research and programs to strengthen scientific research potential * * * in the mathematical, physical, medical, biological, engineering, social, and other sciences, by making contracts or other arrangements (including grants, loans, and other forms of assistance) to support such scientific activities * * * .

42 U.S.C. (Supp. II, 1972) 1862(a)(1).

In light of this pervasive involvement in funding private scientific projects, the question of whether government support of university research projects converts the scientist involved from a private citizen to a "public official" or a "public figure", who must satisfy constitutional standards of actual malice in libel actions, will become increasingly important. Particularly since, under *Gertz* v. *Robert Welch, Inc.*, the fact that a particular research project involves a matter of public interest no longer mandates the application of the actual malice standard, the question of whether government funding makes the recipient a public figure is significant, and should be decided by this Court.

However, the district court did not clearly resolve this question, because at the time of trial the prevailing rule under *Rosenbloom* v. *Metromedia, Inc., supra,* applied the same standard to matters of public interest as to activities of public figures, and accordingly the court accepted petitioner's concession that he was

one or the other (Pet. App. B, *supra,* p. 9a; see Plaintiff's Requested Conclusion of Law 5, *supra* at 5-6).[11] It may be appropriate, therefore, for this Court to vacate the decision and remand the case for a determination of whether petitioner's participation in a government funded research project rendered him a public figure. See *W.M.C.A., Inc.* v. *Simon, supra,* and cases collected at Stern and Gressman, *Supreme Court Practice, supra,* at 221, n. 32.[12]

The answer to that question is far from clear upon the record before the Court. Under ordinary tort rules applicable to determining who is a public figure, cf. *Curtis Publishing Co.* v. *Butts, supra,* 388 U.S. at 155 (Harlan, J.), that status is normally accorded one "who is famous or infamous because of who he is or what he has done." *Cepeda* v. *Cowles Magazines & Broadcasting, Inc.,* 392 F.2d 417, 419. One who has

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[11] The lower federal courts on numerous occasions have found it unnecessary, as did the district court here, to determine where a libel plaintiff is either a public figure or involved in a matter of public interest. E.g., *Cerrito* v. *Time, Inc.,* 449 F. 2d 306, 307. The trial court in *Gertz, supra,* considered "as a basis for (defendant's) motion" for judgment NOV whether Gertz was a public figure, and concluded it need not reach the issue since the event involved was a matter of public interest. *Gertz* v. *Robert Welch, Inc.,* 322 F. Supp. 997, 998, 999-1000, affirmed, 471 F. 2d 801.

[12] Relying upon *Rosenblatt* v. *Baer,* 383 U.S. 75, the district court at one point suggested that petitioner may have been a public official (Pet. App. B, *infra,* p. 9a). However, *Rosenblatt* is completely inapposite to this case, for it dealt with who "among the hierarchy of government employees" could constitute a public official. 383 U.S. at 85. Petitioner at no time was an employee of NASA or any other government agency. Except for this passing reference, there is no other indication that petitioner could possibly have been considered a government official, even under the most expansive reading of *New York Times Co.* v. *Sullvan* and its progeny.

"taken a strong, publicized and positive position on certain national issues," or who has "sought to influence and lead public opinion" qualifies as a public figure. *Walker* v. *Pulitzer Publishing Co.*, 394 F.2d 800, 805. The category may include, e.g., an author who promotes his book, *Dacey* v. *Florida Bar, Inc.*, 427 F.2d 1292, 1295, or a political campaign manager, *Thompson* v. *Evening Star Newspaper Co.*, 394 F.2d 774, 776, as well as a person whose fame in sports activities or other endeavors brings him constantly before the public, *Spahn* v. *Julian Messner, Inc.*, 18 N.Y. 2d 324, 274 N.Y.S. 877, remanded on other grounds, 387 U.S. 239. Thus, a public figure may attain that status "by his purposeful activity amounting to a thrusting of his personality into the 'vortex' of an important public controversy" or by his "position alone." *Curtis Publishing Co.* v. *Butts, supra,* 338 U.S. at 155 (Harlan, J.).

In *Gertz, supra,* this Court synthesized previous decisions to conclude that public figures were those who achieve general fame or notoriety in the community "by reason of the notoriety of their achievements or the vigor and success with which they seek the public's attention * * * ." (Slip op. at 18). The Court further explained:

> In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. In either case such persons assume special prominence in the resolution of public questions.

(Slip op. at 27). Thus it is the public figure's actions to "invite attention and comment" that distinguish him from a private figure, for "the instances of truly involuntary public figures must be exceedingly rare." (Slip op. at 21).[13]

Applying these considerations to the lawyer Gertz, the Court found that "it is plain that petitioner was not a public figure." (Slip op. at 28). Gertz was "well-known in some [professional] circles" but had "achieved no general fame or notoriety in the community" (Slip op. at 28). Similarly, looking to the particular controversy there, Gertz "plainly did not thrust himself into the vortex of this public issue, nor did he engage the public's attention in an attempt to influence its outcome" (Slip op. at 28). Gertz merely carried out his professional duties in an unobtrusive manner, thereby becoming only incidentally entangled in the public debate over the issue of a communist conspiracy against the police.

Viewed against these standards, the case for according "public figure" status to a scientist who receives government funding for his research project in general, and petitioner in particular, is exceedingly weak. First of all, petitioner, while as well-known in the in-

[13] It is precisely this intentional asserting of one's personality or ideas that underlies the imposition of an actual malice standard, for such persons "must accept certain necessary consequences of that involvement in public affairs" and thereby run "the risk of closer personal scrutiny than might otherwise be the case" (Slip op. at 20). This justifies the assumption that "public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehoods concerning them" (Slip op. at 21). But "[n]o such assumption is justified with respect to a private individual" (*Ibid.*), and therefore a lower standard of proof in libel cases is appropriate.

ternational medical research community as was Gertz in the Chicago legal community, certainly had achieved "no general fame or notoriety." Had the case been tried to a jury, it seems certain that—as with Gertz—no prospective juror would have "ever heard of petitioner prior to this litigation" (Slip op. at 28). In no way is Dr. Adey analogous to those who have become famous by their "position alone."

Second, while unquestionably petitioner's research into the effects of weightlessness upon the central nervous system, and the experiment launched as a culmination of that research, were of considerable public interest, there is no evidence whatever that Dr. Adey thrust himself "to the forefront of particular public controversies in order to influence the resolution of the issues involved" (Slip op. at 21). For all the record shows, petitioner's only role was in conducting the experiment prior to the launch of the monkey into space, rather than attempting "to engage the public's attention" to influence support of the experiment.

Resolution of these issues, however, should in the first instance be left to the district court as the finder of fact, who will weigh these and other considerations [14] in reaching a decision. The judgment below therefore should be vacated, and the case remanded for further

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[14] In formulating any rule applicable generally to those whose research projects are funded by the federal government, the court may consider the desirability of reaching a result that would require private scientists who accept government funds to expose themselves to personal and professional attacks which involve less than actual malice. Surely, as a matter of policy, any disinclination to accept funding or participate in a project resulting from such considerations disserves the interests of both the individual scientist and the government.

consideration in light of *Gertz* v. *Robert Welch, Inc., supra.*

2. This case also presents the Court with the opportunity to decide whether a constitutional standard other than the actual malice required in cases of public statements is appropriate where the libel is published solely in a privately circulated, subscriber publication. Petitioner asserted below that where, as here, defamatory statements are made not to the general public, but rather are limited in their distribution to private subscribers, the standards of *New York Times Co.* v. *Sullivan, supra* are inapplicable. Cf. *Curtis Publishing Co.* v. *Butts, supra,* 388 U.S. at 155 (Harlan, J.), noting that the plaintiffs there "had sufficient access to the means of counterargument to be able 'to expose through discussion the falsehood and fallacies' of the defamatory statements."

We start from the proposition that, as the Court has indicated, in libel actions "the relative opportunities * * * to rebut defamatory charges might be germaine" in determining the standard the plaintiff must satisfy. *Time, Inc.* v. *Hill,* 385 U.S. 374. This consideration is relevant because where individuals lack access to the medium circulating the falsehood they "are more vulnerable to injury, and the state interest in protecting them is correspondingly greater." *Gertz* v. *Robert Welch, Inc., supra,* slip op. at 20. Therefore it is clear that not all publications are entitled to the protection of the actual malice standard in libel cases. See *Grove* v. *Dun & Bradstreet, Inc.,* 438 F. 2d 433, certiorari denied, 404 U.S. 898.

In *Grove, supra,* the court distinguished "between a publication which disseminates news for public con-

sumption and one which provides specialized information to a selective, finite audience." 438 F. 2d at 437. In the later case, a libel plaintiff "is denied that opportunity to respond to such false assertions" because "it lacks the very access to the medium which *Times* and its progeny assumed." *Id.* Accordingly, the court held that defamatory information in a credit rating report delivered only to subscribers did not qualify as "a medium entitled to that extended constitutional protection." *Id.*

While there are obvious differences between a credit report and respondents' "special report," the relevant similarity is that neither are sent to other than subscribers, and no attempt is made to distribute them to the press or public, as were the libels involved in *New York Times Co.* v. *Sullivan, supra,* and decisions following in its footsteps. In each of those cases the libeled plaintiff had access to the public media in which the defamatory material was reported.

However, where publication is made only to a small, specialized group unknown to plaintiff and to which he has no access, obviously he cannot respond, except by going to the public press and thereby giving the libel greater display than it had originally. While of course rebuttal "seldom suffices to undo harm of defamatory falsehood" because "the truth rarely catches up with a lie," *Gertz* v. *Robert Welch, Inc., supra,* slip op. at 20, n. 9, the particular vice of privately published libels is that the plaintiff lacks even the opportunity to respond to the audience receiving the publication. When at the same time the plaintiff is not a public official or public figure who can command virtually automatic media attention, he is hardly in a position to answer

the libel by the "robust debate" contemplated by *New York Times Co.* v. *Sullivan.*

The district court's reasons for refusing to explore these considerations, especially its statement that it lacked the authority to do so without express guidance from this Court (Pet. App. B, *infra,* p. 8a), are patently insubstantial. Certainly the confidential nature of the credit rating material found unprotected in *Grove* is unimportant, because it is the publisher of the defamatory material itself who labels it confidential and limits its distribution.[15] That respondents here were not so careful as Dun & Bradstreet to prevent non-subscribers from receiving their report is hardly constitutionally significant, and as noted above, petitioner had no realistic way to rebut the information except in the general press, thereby giving the lie more currency.

Nor is it anomalous, as the district court supposed, to protect with the actual malice standard defamatory statements disseminated to the general public by the news media and others, the purpose of which is obviously spirited debate over the matters involved, while imposing a lesser standard upon defamatory material distributed to a small group of subscribers. Speech aimed at a limited, private audience does not require the same level of constitutional protection as that which forms part of the public debate over public issues.

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[15] Under traditional concepts of tort law, it is immaterial, once the fact of publication is established, that the defendant published it only to a limited audience, although the extent of the publication may affect the damages awarded.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted. Alternatively, the judgment of the court of appeals should be vacated, and the case remanded for reconsideration in light of *Gertz* v. *Robert Welch, Inc., supra.*

Respectfully submitted,

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